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NO.

in the Supreme Court of the United States

OTTO RESENDE

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

RONALD A. DION, ESQ.
Attorney for Petitioner
ENTIN, SCHWARTZ, DION,
AND SCLAFANI, P.A.
2020 Northeast 163rd Street
Suite 300
North Miami Beach, Florida 33162
Telephone: (305) 944-9100

QUESTION PRESENTED

Whether the Comprehensive Drug Abuse Prevention and Control Act regulates and prohibits the possession and distribution of only Cannabis Sativa L as opposed to other species of cannabis.

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-styled cause on May 25, 1982, rehearing denied July 7, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is printed at ____ F.2d ____, and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 25, 1982, rehearing denied July 7, 1982. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE CASE

The Appellant, Otto Resende, was indicted on March 27, 1981, for a violation of 21 U.S.C. §846 (Conspiracy to Possess Controlled Substance with Intent to Distribute), 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (Possession with Intent to Distribute), and 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (Distribution of Controlled Substance).

On June 22, 1981, a non-jury trial commenced in Miami, Florida before the Honorable Sidney M. Aronovitz, who found Resende guilty on all accounts.

On July 23, 1981, Resende was sentenced to a term of five years as to each of the three counts, these terms to run concurrently with each other; a special parole term of two years as to Counts One and Three; and a fine in the sum of $25,000 on each count.

The conviction and sentence were affirmed by the United States Court of Appeals for the Eleventh Circuit on May 25, 1982, rehearing denied July 7, 1982. This Petition for Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

On March 11, 1981, the Appellant, Otto Resende, hereinafter "Otto", went to Room 229 of the Ramada Inn on Milan Dairy Road in Miami, Florida. Otto was met by the defendant, Onelio Garcia, Sergio Garcia and the confidential informant, Norwood Lee Wilson. Norwood Wilson, who was also charged in the present case, testified that he had a conversation with Otto and Onelio Garcia. However, some of the conversation was in Spanish, which Wilson did not understand. After this conversation, Otto went to the parking lot and brought DEA Agent Pedro Velasco to the room.

Wilson testified that a conversation ensued between Agent Velasco, Wilson and Otto, and that the three of them then went to the parking lot and drove in a truck to a house. However, Agent Velasco testified that he left the room alone and then later returned. At this time, the defendant Angelo Molde entered the room, and Wilson, Velasco, Angelo and Otto went to the parking lot. None of the conversations were noted or electronically recorded.

Wilson, Angelo and Otto drove away to a house on 67th Lane. Agent Velasco testified that the truck returned with bales contained within it.

Upon returning to the lobby of the Ramada Inn, Otto was arrested. Sergio and Onelio Garcia were arrested in the room.

The truck was driven to the Miami District Office and a subsequent search ensued for contraband. On March 13, 1981, the substance found in the house and

the truck were discarded except for a few random samples. On March 16, 1981, the samples were delivered by Velasco to Ruth Beaver at the Southeast Regional Laboratory.

The samples were examined by Charles Clifford Clark, a forensic chemist. Mr. Clark testified that he performed three tests on the substance and concluded it was Cannabis Sativa. No evidence concerning the accuracy of the methods and results of the test was introduced by the Government. Nor did the Government present any evidence concerning the species of Cannabis allegedly identified.

ARGUMENT

THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT REGULATES AND PROHIBITS THE POSSESSION AND DISTRIBUTION OF ONLY CANNABIS SATIVA L AS OPPOSED TO OTHER SPECIES OF CANNABIS.

The Appellant would respectfully submit that the Government failed to prove a violation of the Comprehensive Drug Abuse Prevention and Control Act in that it failed to establish the species of the Cannabis examined.

The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §841(a)(1) and 802(15) defines Cannabis as "all parts of the plant Cannabis sativa L." Appellant would respectfully submit that the classification of Cannabis as a narcotic should be limited, as indicated in the statute, to the plant Cannabis sativa L.

The plant taxonomists recognize more than one species or category of marijuana. A sufficient distinction between Cannabis sativa L. and Cannabis indica Lam. has been recognized so as to require categorization of the different species.

"It seems clear that if in a penal statute congress used a word like 'giraffe' from the animal kingdom, the statute could not be construed to include a 'potato' from the plant kingdom . . . That penal statutes are to be strictly construed requires no citation of authority. . . . This statute is not vague; it applies to Cannabis sativa L. and to nothing else." *United States v. Lewellen*, 385 F.Supp. 140 (D.C. Wisc. 1974).

"The inclusion of the single term "Cannabis sativa L." in the final draft of the Uniform Narcotics Act was a conscious choice made with full cognizance that botanical literature reflect the possible existence of more than one species. . . . It was easily within the power of congress to draft a statute sufficiently broad to include all species of Cannabis." *United States v. Collier*, 14 Cr.L.R. 2501 (D.C. 1974).

In addition, the defendant would respectfully submit that the Government has failed to demonstrate either that the Cannabis is monotypic or a member of the sativa L. species.

In addition, it is respectfully submitted that the Government has failed to establish that there was a "usable" amount of THC in the marijuana found.

> [I]n this case the active ingredient in marijuana, THC, is minute in quantity when compared to the large bulk of non-halucinogenic, inert plant material. The THC in the defendant's plants is comparable, in this context, to a minute amount of heroin embedded within a large amount of inert matter, such as milk sugar or quinine. This case is squarely governed by the decision in *Payne v. U.S.*, 294 A.2d 503. Where the court reversed a marijuana possession conviction under Sec. 33-402 because the prosecution failed to show that the defendant possessed a usable amount of the substance. . . . it is thus plain that even if the defendant's plants were of the Cannabis species proscribed by Secs. 33-401 and 402, he would nevertheless be entitled to acquittal in this case, since those plants did

not contain an amount of THC, the psychoactive agent in marijuana, sufficient to render the plants usable as a "narcotic drug."

United States v. Collier, supra. In the absence of first establishing a "usable amount" classification of the marijuana seized herein as a "narcotic drug" violation of the due process requirement of drug classification exists.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

RONALD A. DION, ESQ.
ENTIN, SCHWARTZ, DION,
AND SCLAFANI, P.A.
2020 Northeast 163rd Street
Suite 300
North Miami Beach, Florida 33162
Telephone: (305) 944-9100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Solicitor General, Department of Justice, Washington, D.C., 20530, this ____ day of July, 1982.

RONALD A. DION, ESQ.
ENTIN, SCHWARTZ, DION,
AND SCLAFANI, P.A.
2020 Northeast 163rd Street
Suite 300
North Miami Beach, Florida 33162
Telephone: (305) 944-9100

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5762
Non-Argument Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

OTTO RESENDE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(May 25, 1982)

Before FAY and KRAVITCH, Circuit Judges, and YOUNG**, District Judge.

PER CURIAM:

Convicted on three counts dealing with possession and distribution of marijuana, appellant contends that the prosecution failed to present sufficient evidence from which the jury could find that the substance in issue was marijuana. Despite the presence of expert

*Fed. R. App. P. 34(a); 11th Cir. R. 23.

**Honorable George C. Young, U.S. District Court Judge for the Middle District of Florida, sitting by designation.

testimony identifying the marijuana, it is argued that the government failed to prove that the chemical analysis performed was accurate. We find such argument frivolous. There was overwhelming direct and circumstantial evidence identifying the contraband involved.

AFFIRMED.